UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RUSS RILEY, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	CASE NO. C11-5318-TSZ-MAT REPORT AND RECOMMENDATION

Plaintiff Russ Riley appeals the final decision of the Commissioner of the Social Security Administration ("Commissioner") which denied his applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge ("ALJ"). For the reasons set forth below, the Court recommends that the Commissioner's decision be REVERSED and REMANDED for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was born in 1974, and has a seventh grade education. (Administrative Record ("AR") at 36, 106, 111, 136.) His past work experience includes employment as a car

mechanic, dishwasher, horse groom, machine operator, pool helper, and laborer. (AR at 131.) Plaintiff asserts he is disabled due to mental illness, severe mood swings, and bipolar disorder. (AR at 130.) He asserts an onset date of December 31, 2002. (AR at 106, 111.)

The Commissioner denied plaintiff's applications initially and on reconsideration. (AR at 66-72, 74-77.) Plaintiff requested a hearing before an ALJ which took place on August 3, 2009. (AR at 29-61.) On August 17, 2009, the ALJ issued a decision finding plaintiff not disabled. (AR at 17-28.) Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council (AR at 1-6), making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On November 12, 2010, plaintiff timely filed the present action challenging the Commissioner's decision. (Dkt. No. 3.)

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether a claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since December 31, 2002, the alleged onset date. (AR at 19.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff had the following severe impairments: bipolar disorder, personality disorder evidenced by intense and unstable interpersonal relationships and impulsive and damaging behavior, and substance addiction disorder in current remission. *Id.*

Step three asks whether a claimant's impairments meet or medically equal a listed impairment. The ALJ found plaintiff did not have an impairment or combination of impairments that met or medically equaled a listed impairment. (AR at 21.) If the claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC to perform the full range of work at all exertional levels but with nonexertional limitations. (AR at 22.) The ALJ determined that plaintiff was capable of performing his past relevant work as a stable attendant. (AR at 27-28.) If the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett v. Apfel*, 180 F.3d 1094, 1099-1100 (9th Cir. 1999). Alternatively, the ALJ also determined that plaintiff was capable of making a successful adjustment to other work that exists in significant numbers in the national economy, such as janitor and landscape laborer. (AR at 28.) Accordingly, the ALJ concluded plaintiff was not disabled. (AR at 28.)

Plaintiff argues the ALJ (1) improperly evaluated the medical evidence, (2) improperly evaluated his testimony, (3) improperly evaluated the lay witness evidence, (4) improperly assessed his RFC, and (5) erred in finding he could return to his past relevant work. (Dkt. No. 14.) He requests remand for further administrative proceedings. *Id*. at 22. The Commissioner argues the ALJ's decision is supported by substantial evidence and should be

affirmed. (Dkt. No. 15.) For the reasons described below, the Court agrees with the plaintiff.

A. Medical Evidence

Plaintiff argues that the ALJ failed to properly evaluate the medical opinions of Lorraine Barton-Haas, M.D., Daniel A. Kodner, M.D., Jeff Bremer, Ph.D., Richard Price, M.D., Jack T. Norris, Ph.D., and William Lysak, Ph.D. (Dkt. No. 14 at 3-24.) The Commissioner disagrees and responds that the ALJ properly considered the medical evidence. (Dkt. No. 15 at 5-13.)

In determining whether a claimant has a severe impairment, the ALJ must evaluate the medical evidence and explain the weight given to the opinions of accepted medical sources in the record. The regulations distinguish among the opinions of three types of accepted medical sources: (1) sources who have treated the plaintiff; (2) sources who have examined the plaintiff; and (3) sources who have neither examined nor treated the plaintiff but express their opinion based upon a review of the plaintiff's medical records. *See* 20 C.F.R. §§ 404.1527, 416.927; *see also Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

The ALJ may reject a physician's opinion "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). Rather than merely stating his conclusions, the ALJ "must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id*. (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). Although an ALJ generally gives more weight to an examining doctor's opinion than to a non-examining doctor's opinion, a non-examining doctor's opinion may nonetheless constitute substantial evidence if it is consistent with other independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Orn v. Astrue*, 495 F.3d 625, 632-33 (9th Cir. 2007).

1. Lorraine Barton-Haas, M.D.

On September 30, 2008, treating psychiatrist Dr. Barton-Haas completed a Psychiatric Evaluation of the plaintiff. (AR at 506-12.) Dr. Barton-Haas wrote,

> [Plaintiff] reports that he has been a heavy drinker and continues to drink daily at this time, three to four beers a day to help him relax and play the guitar. He also reports that he gets intoxicated about two to three times a month, usually with beer. He reports a history of using cocaine and methamphetamine, but discontinued more than six years ago.

(AR at 508.) Dr. Barton-Haas also noted plaintiff was using medical marijuana once or twice a week for back pain. (AR at 509.) She diagnosed plaintiff with mood disorder not otherwise specified ("NOS"); rule out ("r/o") bipolar II disorder; r/o intermittent explosive disorder; r/o impulse control disorder NOS; generalized anxiety disorder NOS; r/o panic disorder with agoraphobia; r/o post traumatic stress disorder ("PTSD"); alcohol abuse; cannabis abuse; history of stimulant and hallucinogen abuse, in sustained remission; personality disorder NOS,

with antisocial and narcissistic traits; learning disorder NOS; and r/o borderline intellectual function. (AR at 512.) She assigned plaintiff a Global Assessment of Functioning ("GAF") score of 45, indicating "serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS (Text. Rev., 4th ed. 2000).

The ALJ considered the GAF score assigned to plaintiff by Dr. Barton-Haas, but declined to give it much weight stating,

> In contrast to the claimant's reports to Dr. Barton that he drank 3 or 4 beers [a] day, on chemical dependency assessment in October 2008 he reported drinking up to 30 beers every two days. (Exhibit 19F/24). Chemical dependency treatment records show that he was abusing cocaine when he entered treatment in March 2009 (Exhibit 21F). The claimant was aware that he should not use alcohol while on psychotropic medications. Considering his unreported alcohol excessive alcohol intake, his unreported cocaine use, and his other credibility factors (for example, the unsubstantiated allegations of side effects from lithium and Prozac – compare the prison medical records, showing significant benefit from those medications), Dr. Barton did not have accurate information on which to based her assignment. Accordingly, the assessed GAF score is discounted.

AR at 24.

Plaintiff argues that the ALJ's reasons for rejecting Dr. Barton-Haas' opinion are based on a misinterpretation of the medical evidence. (Dkt. No. 14 at 5.) Plaintiff contends that he did not state that he was "drinking up to 30 beers every two days," rather, he reported "*periods of daily alcohol consumption in amounts up to 30 beers every two days*." (AR at 513, emphasis added.) He further stated that "*[w]ithin the past 30 days, he estimates consuming alcohol approximately every other day with his last reported alcohol use occurring 'last night*.'" *Id*. The Court agrees that these statements are not inconsistent with his report to Dr.

Barton-Haas.

In addition, plaintiff points out that the ALJ's statement that "[c]hemical dependency treatment records show that he was abusing cocaine when he entered treatment in March 2009" is also factually incorrect. Rather, plaintiff's intake evaluation at Pioneer Center North shows he reported that he last used cocaine "7 years ago." (AR at 568.) Accordingly, the Court agrees with plaintiff that the ALJ erred in concluding that "[c]onsidering his unreported alcohol excessive alcohol intake, his unreported cocaine use, and other credibility factors . . . Dr. Barton did not have accurate information on which to base her assessment." (AR at 24.)

The Commissioner concedes the evidence is not clear that plaintiff was abusing cocaine when he entered treatment in March 2009, but argues that Dr. Barton-Haas noted plaintiff was "cautious during the interview and this may affect some of the reliability of the information." (AR at 506.) He further contends that the GAF scale "'does not have a direct correlation to the severity requirements in out mental disorders listings' under the Social Security Act." (Dkt. No. 15 at 7.) He also contends that "Dr. Barton noted no functional limitations – thus, her opined GAF score was based on Plaintiff's symptoms," and should not be considered. *Id*.

Although the Commissioner offers several reasons that could justify rejecting Dr. Barton-Haas' opinion, the fact remains that these were not the reasons cited by the ALJ. The Court reviews the ALJ's decision "based on the reasoning and factual findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 2009) (citations omitted). On remand, the ALJ should reevaluate Dr. Barton-Haas' opinion and its affect on plaintiff's RFC assessment.

2. Daniel A. Kodner, M.D.

On July 10, 2007, treating psychiatrist Dr. Kodner completed a Psychiatric Evaluation of the plaintiff. (AR at 542-46.) Dr. Kodner noted that plaintiff had "a long pattern of affective dysregulation with intense anger outburst, behavioral dyscontrol and impulsivity, antisocial behavior, and unstable relationships." (AR at 545.) He noted plaintiff's insight and judgment were chronic impairments. *Id*. He diagnosed plaintiff with r/o bipolar II disorder, currently hypomanic; r/o bipolar I disorder; r/o substance-induced mood disorder; alcohol abuse, r/o alcohol dependence; cannabis abuse, r/o dependence; history of cocaine dependence; r/o impulse control disorder NOS; r/o intermittent explosive disorder; personality disorder NOS; antisocial and narcissistic traits are prominent. (AR at 545-46.) Dr. Kodner assigned plaintiff a GAF score of 45. (AR at 546.)

The parties are in agreement that the ALJ failed to address Dr. Kodner's opinion. (Dkt. No. 14 at 6; Dkt. No. 15 at 8.) The Commissioner argues that this should be considered harmless error and proffers reasons not set forth in the ALJ's decision as to why Dr. Kodner's opinion should be dismissed. (Dkt. No. 15 at 9.) However, the ALJ is required to discuss reasons for rejecting a treating physician's opinion, and the Court may not affirm the ALJ's decision based on reasoning the ALJ did not cite. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56 (9th Cir. 2006). The ALJ is directed to evaluate Dr. Kodner's opinion on remand.

3. Jeff Bremer, Ph.D.

Dr. Bremer completed two Department of Social and Health Services ("DSHS") psychological evaluations of the plaintiff. (AR at 364-71, 445-52.) On August 29, 2006, he

diagnosed plaintiff with bipolar disorder, personality disorder NOS with borderline and antisocial features (provisional), and polysubstance abuse in reported remission. (AR at 365.) He opined that plaintiff had "marked" limitations in several social factors, noting that plaintiff had extremely poor social skills, including stress tolerance, and could be highly inappropriate depending on his mood or situation. (AR at 366.) On October 2, 2007, Dr. Bremer opined plaintiff had "marked" and "severe" limitations in social factors, noting that plaintiff was highly volatile and could quickly become violent. (AR at 447.)

The ALJ gave limited weight to Dr. Bremer's opinion because he was unaware that plaintiff continued to abuse substances throughout the period at issue. (AR at 23.) He also discounted Dr. Bremer's assessments to the extent he relied on plaintiff's subjective complaints in forming his opinions, which the ALJ found not credible. *Id.* These are specific and legitimate reasons for rejecting Dr. Bremer's opinions.

Plaintiff argues this was not a legitimate reason for rejecting plaintiff's opinion because the ALJ was basing his analysis on his false assumption that plaintiff had "ongoing substance abuse." (Dkt. No. 14 at 8.) As the Commissioner points out, however, plaintiff fails to acknowledge he was abusing alcohol at the time. When asked about alcohol or drug abuse, Dr. Bremer wrote in 2006, "by history, yes," "by history, not now," and in 2007, "No, claims no drugs, some alcohol." (AR at 365, 366, 446, 447.) However, the record shows plaintiff acknowledged using alcohol at the time. (AR at 406, 513, 543, 557, 562, 568.) An ALJ may give less weight to an opinion that is inconsistent with other evidence in the record. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). Dr. Bremer's evaluations indicate he was unaware of plaintiff's ongoing alcohol abuse. (AR at 508, 513.)

In addition, an ALJ may reject a physician's opinions that are predicated on a claimant's self-reports that have been properly discounted as incredible. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (citing *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)). As indicated below, the ALJ properly discounted plaintiff's testimony. The ALJ did not err in giving limited weight to Dr. Bremer's opinions.

4. Richard Price, M.D.

On January 3, 2007, six months after plaintiff's release from prison, Dr. Price performed a psychiatric evaluation. (AR at 377-81.) He diagnosed plaintiff with bipolar disorder, polysubstance abuse, r/o dependence, in remission, and antisocial personality disorder, with a GAF score of 50. (AR at 380.) He stated that plaintiff's "principle problem seems to be strong antisocial personality traits." (AR at 380.) He opined that plaintiff had the ability to perform simple and repetitive tasks in an indirectly supervised position, noting "[h]is major difficulty seems to be getting along with others." (AR at 380-81.) He also opined plaintiff would likely have difficulty interacting with co-workers and the public. (AR at 381.) Dr. Price stated, "In a position with indirect supervision, he probably would be able to perform activities consistently and maintain regular attendance in the workplace." *Id.* He recommended psychotropic medications, commenting that "I suspect without some symptomatic control, he will continue to bounce from job to job and perhaps from incarceration to incarceration." (AR at 380.)

The ALJ noted that plaintiff "was abusing substances throughout much of the period at issue." (AR at 24.) The ALJ found that when plaintiff is abstinent, his mental status examination findings are normal, as evidenced by his prison records and his records from

Pioneer Center North, where plaintiff completed a sixty-day inpatient treatment program. (AR at 24, 203-363, 563-89.) The ALJ accepted Dr. Price's opinion that plaintiff can consistently perform unskilled work, "but not that he requires indirect supervision." (AR at 24.)

Plaintiff again argues that the ALJ's analysis is based on the incorrect assumption that he was abusing substances throughout much of the period at issue. (Dkt. No. 14 at 9.) He contends that he reported to Dr. Price that he was abstinent from alcohol at the time, and there is no evidence to the contrary. *Id*. However, as the Commissioner points out, during an intake assessment for Behavioral Health Resources ("BHR") in December 2006, plaintiff admitted using alcohol "in the past 12 months." (AR at 406.) In addition, plaintiff acknowledged he was untruthful about his alcohol use during a March 2009 assessment, "he admitted that his counselors at BHR had no idea he was consuming alcohol while in treatment." (AR at 557.) Accordingly, the ALJ properly considered evidence of plaintiff's substance abuse, including alcohol, during the period when Dr. Price evaluated him.

In addition, the ALJ reasonably found Dr. Price's conclusions were inconsistent with medical evidence which showed plaintiff's mental status exams were within normal limits when he was abstinent. (AR at 340, 342, 346, 348-50, 563-64.) The ALJ's reasons for rejecting Dr. Price's opinions are specific and legitimate and supported by substantial evidence in the record. As such, the ALJ did not err in evaluating the opinion of Dr. Price.

5. Jack T. Norris, Ph.D.

On September 23, 2008, Dr. Norris performed a DSHS psychological evaluation of plaintiff. (AR at 480-89.) He diagnosed personality disorder NOS, mood disorder NOS, polysubstance abuse in sustained full remission, and active alcohol abuse. (AR at 481.) He

indicated that plaintiff's substance and alcohol abuse did not contribute to his mental impairments, and stated that plaintiff used alcohol and drugs to self-medicate. (AR at 481-82.) He opined that plaintiff had "marked" social limitations, noting plaintiff's activities of daily living, history, testing, and clinical observations. (AR at 482.) He also noted that plaintiff "has paranoid tendencies, has easily triggered memories of trauma, has poor anger control, and is currently abusing alcohol." *Id*.

The ALJ rejected Dr. Norris' opinion that plaintiff's substance and alcohol abuse did not contribute to his mental impairments, finding his conclusion was contradicted by the prison medical records and the chemical dependency treatment records which showed plaintiff's mental status examination findings improved with abstinence. (AR at 25.) The ALJ also discounted Dr. Norris' opinion to the extent he relied on plaintiff's subjective complaints. *Id*.

Plaintiff argues that the fact that he had on several occasions better mental status examination findings is not a legitimate reason to reject Dr. Norris' opinion. (Dkt. No. 14 at 10-11.) The Court disagrees. As the Commissioner argues, the fact that plaintiff's mental impairments improved with abstinence directly contradicts Dr. Norris' opinion that plaintiff's active alcohol abuse did not contribute to his mental impairments. (AR at 340-46, 348-50, 563-64.) An ALJ may properly reject an opinion that is conclusory and inconsistent with the record. *See generally Meanel v. Apfel*, 172 F.3d 1111, 1113-14 (9th Cir. 1999); *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986).

In addition, an ALJ may reject a doctor's opinion that is based on a claimant's subjective complaints that have been properly discounted as incredible. *Morgan*, 169 F.3d at 602. As indicated below, the ALJ properly discounted plaintiff's testimony. The ALJ did not

err in rejecting Dr. Norris' opinions that were based, in part, on plaintiff's self-reports.

6. William Lysak, Ph.D.

On January 8, 2007, State agency psychologist Dr. Lysak reviewed the record and completed a Mental Residual Functional Capacity Assessment ("MRFC") of the plaintiff. (AR at 396-98.) In Section I, titled "Summary Conclusions," Dr. Lysak indicated plaintiff was "markedly limited" in his ability to work in coordination with or proximity to others without being distracted by them, interact appropriately with the general public, and get along with coworkers or peers without distracting them or exhibiting behavioral extremes. (AR at 396-97.) He also assessed several moderate limitations under understanding and memory, concentration and persistence, social interaction, and adaption. *Id*.

In Section III, titled "Functional Capacity Assessment," Dr. Lysak opined that plaintiff retained the capacity for "simple tasks for a normal work day/week with occasional interruption from psychiatric symptoms." (AR at 398.) Dr. Lysak also opined that plaintiff would "be able to handle limited public contact," and "would be able to perform work activities consistently in a position with indirect supervision." *Id*. He concluded that plaintiff had the "ability to meet his basic adaptive needs." *Id*. The ALJ adopted Dr. Lysak's assessment, finding it "consistent with the record as a whole." (AR at 24.)

Plaintiff argues that although the ALJ adopted Dr. Lysak's assessment, he failed to include in his RFC assessment all of the marked and moderate limitations described by Dr. Lysak in Section I of the MRFC. (Dkt. No. 14 at 11-12.) However, as explained in the agency's Program Operations Manual, an ALJ properly focuses on the "narrative" portion of the MRFC form, rather than the "Summary Conclusions" portion. *See* Program Operations

Manual System ("POMS") DI 25020.101(B)(1). The POMS provides,

> The purpose of section I ("Summary Conclusion") on the SSA-4734-F4-SUP is chiefly to have a worksheet to ensure that the psychiatrist or psychologist has considered each of these pertinent mental activities and the claimant's or beneficiary's degree of limitation for sustaining these activities over a normal workday and workweek on an ongoing, appropriate, and independent basis. **It is the narrative** written by the psychiatrist or psychologist **in section III** ("Functional Capacity Assessment") of form SSA-4734-F4-SUP **that adjudicators are to use as the assessment of RFC**. Adjudicators must take the RFC assessment **in section III** and decide what significance the elements discussed in this RFC assessment have in terms of the person's ability to meet the mental demands of past work or other work. This must be done carefully using the adjudicator's informed professional judgment.

Id. It is clear that the ALJ acted in accordance with the agency's established procedures when he relied on the narrative portion of Dr. Lysak's opinion set forth in the Functional Capacity Assessment rather than on the limitations recorded in the Summary Conclusions section. Accordingly, the ALJ properly evaluated Dr. Lysak's opinion.

7. New Medical Evidence

Plaintiff argues that additional evidence submitted to the Appeals Council, but not reviewed by the ALJ, supports remand of plaintiff's disability claims for a new hearing. (Dkt. No. 14 at 12-13.) Specifically, he argues that a psychological evaluation performed by Terilee Wingate, Ph.D., on December 10, 2010, combined with the other medical evidence of record, shows that the ALJ's decision is not supported by substantial evidence and is based on legal error. *Id*. at 12.

It is clear that the ALJ did not err in failing to consider this evidence, as it was not before him when he issued his decision. This additional evidence was submitted by plaintiff to the Appeals Council following the ALJ's August 17, 2009, decision. (AR at 594-606.) After

reviewing the additional evidence, the Appeals Council concluded that it did not provide a basis for reversing the ALJ's decision. (AR at 2.) Nevertheless, plaintiff requests that the Court consider it now in determining whether the ALJ's decision is supported by substantial evidence. (Dkt. No. 14 at 12-13.)

The Ninth Circuit has recently held that the Court may consider additional evidence submitted to the Appeals Council for the purposes of determining "whether, in light of the record as a whole, the ALJ's decision was supported by substantial evidence and was free of legal error." *Taylor v. Comm'r of Soc. Sec. Admin*., 659 F.3d 1228, 1232 (9th Cir. 2011) (citing *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993)). Here, however, the Court does not have to decide whether Dr. Wingate's psychological evaluation would justify a remand. Because this matter is being remanded, and these materials are part of the record, the ALJ should consider Dr. Wingate's evaluation as part of his reevaluation of the medical evidence.

B. Credibility

Plaintiff argues that the ALJ erred in finding his testimony not credible. (Dkt. No. 14 at 13-18.) According to the Commissioner's regulations, a determination of whether to accept a claimant's subjective symptom testimony requires a two step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen v. Chater*, 80 F.3d 1273, 1281 (1996); SSR 96-7p. First, the ALJ must determine whether there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d

341, 343 (9th Cir. 1991) (en banc); *Reddick*, 157 F.3d at 722. Absent affirmative evidence showing that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284.

When evaluating a claimant's credibility, the ALJ must specifically identify what testimony is not credible and what evidence undermines the claimant's complaints; general findings are insufficient. *Id*. The ALJ may consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains. *Id*.

In this case, there was no evidence that plaintiff was malingering. Consequently, the ALJ was required to provide clear and convincing reasons to reject his testimony. As stated by the ALJ, plaintiff testified that "he had not used alcohol or drugs since he was in the inpatient chemical dependency program. He reported problems with depression, anger, and anxiety. He described losing jobs because of conflicts. He also testified that he has concentration problems and problems completing tasks." (AR at 26.) The ALJ determined that plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms, but that his statements concerning the intensity, persistence, and limiting effects of these symptoms were not credible. *Id*.

1. Physical Impairments

First, the ALJ found plaintiff's pain allegations were less than credible because objective imaging studies did not document arthritis and degenerative disc disease, and because his allegations were "notably inconsistent." (AR at 26.) For example, plaintiff's prison

health records from 2002 to 2006 noted plaintiff to be in good physical condition, with no diagnosis other than a thyroid disorder. (AR at 20, 26, 323.) Likewise, health records from Providence Rochester Medical Center in October 5, 2006, stated that plaintiff "denies history of any back or neck problems. He has never had any broken bones or surgeries. No history of arthritis." (AR at 20, 26, 374.) However, in 2007, plaintiff alleged chronic neck and back pain for the past five to ten years. (AR at 20, 26, 431-32, 454.) Examination findings were normal except for tenderness to palpitation. (AR at 20, 428, 440, 442-43, 454.) In addition, plaintiff was referred to physical therapy but was discharged due to poor attendance. (AR at 20, 26, 456-57.)

Substantial evidence supports the ALJ's finding that plaintiff's allegations of chronic pain were inconsistent with clinical and objective findings. Inconsistencies such as this can be properly used by the ALJ to find a claimant not credible. *Batson*, 359 F.3d at 1196-97. The ALJ did not err in finding plaintiff's pain allegations not credible.

2. Inconsistent Statements Regarding Alcohol and Drug Use

Second, the ALJ found plaintiff's inconsistent statements about his alcohol and drug use negatively affected his credibility. (AR at 26.) As discussed above, plaintiff gave different reports to different evaluators and health care providers. For example, during a March 2009 assessment, plaintiff "admitted that his counselors at BHR had no idea he was consuming alcohol while in treatment." (AR at 557.) Although plaintiff argues that he "did inform BHR of his alcohol use and he requested inpatient treatment," the medical record shows that during the first six months of his treatment at BHR, plaintiff admitted to only "occasional self-medicating with alcohol." (AR at 413, 400-15, 490-52.) Moreover, none of his

providers at BHR were informed of the amount that he consumed (a fifth of whiskey and beer on a daily basis.) (AR at 406, 508, 513, 528, 543, 556, 561.) The ALJ properly considered plaintiff's inconsistent statements regarding his alcohol use when evaluating his credibility. *See Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (holding the ALJ properly relied on inconsistent statements regarding the claimant's drinking as a basis to reject his testimony).

However, substantial evidence does not support the ALJ's conclusion that plaintiff's statements regarding his drug use have been inconsistent. The ALJ states that plaintiff reported to Dr. Barton-Haas in September 2008 that he had not used cocaine or methamphetamines for more than six years, and he told Dr. van Dam in March 2009 that he had not used drugs for many years. (AR at 26, 508, 557.) However, the ALJ notes that his diagnoses at Pioneer Center North, where he received inpatient treatment in 2009, included "cocaine dependence with psychological dependence." (AR at 26, 563.) But, as plaintiff points out, his diagnosis of cocaine dependence with psychological dependence was based on his history of cocaine use, not ongoing use. Other records from Pioneer Center North indicate that plaintiff's last cocaine use was "7 years ago." (AR at 568.) Accordingly, the Court agrees with plaintiff that the ALJ erred in concluding that plaintiff gave inconsistent statements regarding his cocaine use when evaluating his credibility.

The ALJ also noted that plaintiff has a history of marijuana abuse and managed to obtain authorization to possess marijuana for medical purposes. (AR at 26.) The ALJ found plaintiff's chemical dependency counselor did not regard his medical marijuana use as medically necessary, as evidenced by the counselor's comment in February 2009 that "[h]is time here has been productive (as he has discontinued his use of marijuana)." (AR at 490.)

It is unclear how plaintiff's medical marijuana use affects his credibility. Although plaintiff's counselors apparently discouraged his marijuana use, they were aware that he used marijuana, and the record contains documentation of medical authorization to possess marijuana for medical purposes in Washington State. (AR at 490, 493, 513.) Because plaintiff had medical authorization to possess and use medical marijuana for medical purposes, the ALJ's conclusion that plaintiff's marijuana use negatively impacts his credibility is rejected. Nevertheless, the ALJ properly considered plaintiff's inconsistent statements regarding his alcohol use when evaluating his credibility.

3. Inconsistent Statements Regarding the Side Effects of Medication

The ALJ also found that plaintiff's statements regarding the side-effects of Prozac and lithium were inconsistent. (AR at 26.) While in prison, plaintiff reported that "the Prozac and lithium makes him feel whole," and that "this is the first time he feels normal." (AR at 348.) He also stated that he slept and ate well. *Id*. After his release from prison, plaintiff sought refills of Prozac and lithium. (AR at 433.) However, on January 3, 2007, he reported to Dr. Price that he was tried on lithium, Prozac, Depakote, Depakene, and Sinequan, but that "he got toxic on lithium." (AR at 378.) He also reported to BHR counselors that he was treated with lithium and Depakote while in prison, but that the "meds didn't work." (AR at 413.) In September 2008, plaintiff told Dr. Barton-Haas that Prozac made him hyper and lithium made him toxic and caused him to hallucinate. (AR at 507.) Dr. Barton-Haas subsequently noted in February 2009 that plaintiff had a very good response to Prozac, with decreased anger and impulsivity. (AR at 492-93.) The ALJ did not err in finding plaintiff's various statements regarding the side effects from his psychotropic medications were not consistent. *Smolen*, 80

F.3d at 1281.

4. Inconsistent Test Results

Finally, the ALJ found inconsistencies in plaintiff's "symptom validity testing" and "intelligence testing" on evaluation with Dr. Carla van Dam undermined his credibility. (AR at 25, 26, 553-62.) Dr. van Dam noted that "[s]ymptom validity testing was administered, with Mr. Riley endorsing multiple difficulties in memory and cognitive as well as emotional problems that are inconsistent with those individuals who have such conditions." (AR at 559.) In addition, plaintiff's performance on intelligence testing was inconsistent. (AR at 559-60.) Dr. van Dam noted "[w]hile he appeared focused and seemed to attend to test items, he was also quite quick to give up on some items, and on other subtests he seemingly could not manage the simple tasks yet did some of the more complex tasks without difficulty." (AR at 559-60.) For these reasons, Dr. van Dam suggested plaintiff's test scores may understate his actual competence and/or potential. (AR at 560.) The ALJ properly found that inconsistencies in psychological testing identified by the examining psychologist diminished plaintiff's credibility. *Thomas*, 278 F.3d at 958-59 (finding that failure to give maximum or consistent effort during physical capacity evaluation supported the ALJ's credibility determination). The ALJ did not err in making an adverse credibility assessment.

The foregoing reasons offered by the ALJ to justify his adverse credibility determination are sufficiently clear and convincing and supported by substantial evidence in the record. The ALJ permissibly discounted plaintiff's pain allegations as inconsistent with the clinical and objective findings. In addition, the ALJ permissibly discounted plaintiff's testimony regarding his mental limitations based on inconsistent statements regarding his

alcohol use, inconsistent statements regarding the side effects of medication, and inconsistencies in psychological test results. The ALJ did not err, and his adverse credibility determination must be affirmed.

C. Lay Witness Testimony

Plaintiff argues that the ALJ erred in evaluating the lay witness evidence of his brother, Ethan S. Riley, and his wife, Connie Riley. (Dkt. No. 14 at 18-19.) In order to determine whether a claimant is disabled, an ALJ may consider lay-witness sources, such as testimony by spouses, parents, siblings, and friends. *See* 20 C.F.R. § 404.1513(d). Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence that cannot be disregarded without comment. 20 C.F.R. §§ 404.1513(d)(4), 416.913(d)(4); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). To discount lay witness testimony, the ALJ must "provide reasons germane to each witness." *Id*.

Plaintiff's brother completed a third-party report form on October 19, 2006. (AR at 154-62.) He reported that plaintiff's mental anxiety stopped him from sitting still, talking, or listening. (AR at 159.) He also reported that plaintiff had difficulty following written instructions stating, "Average person 1 hr task, Russ a day maybe two." (AR at 159.)

The ALJ found plaintiff's "work activity in prison contradicts that report." (AR at 27.) In addition, the ALJ found that Mr. Riley seemed unaware of plaintiff's alcohol and drug use. *Id*. "For those reasons, and . . . given the claimant's general lack of credibility," the ALJ gave little weight Mr. Riley's report. *Id*.

The ALJ gave inadequate reasons for discounting Mr. Riley's report. The ALJ rejected the report as inconsistent with plaintiff's work activity in prison, but did not identify any

specific inconsistencies. (AR at 27, 203-363.) Rather, plaintiff's prison records indicate only that he was "medically cleared for: All Work Assignments" (AR at 257), denied work assignments (AR at 258), "job assignment is Inside Grounds" (AR at 330), "Refusing to Work" (AR at 331), and "currently housed in Confinement, under investigation and is not assigned a job at this time" (AR at 340). (AR at 257-58, 330-31, 340.) The ALJ also rejected Mr. Riley's report because he *appeared* to be unaware of plaintiff's alcohol and drug use. (AR at 27.) However, Mr. Riley's report does not indicate whether he was aware plaintiff was using drugs and alcohol or not. Accordingly, the ALJ's reason is based on speculation and conjecture and is not a germane reason for giving his report little weight. Moreover, as indicated above, there is no evidence that plaintiff continued to abuse drugs after he was released from prison. Finally, an ALJ cannot reject lay testimony simply by rejecting the credibility of the claimant. *See Dodrill*, 12 F.3d at 918-19 (holding that lay witnesses are competent to make independent observations of a claimant's symptoms and daily activities, and to testify as to her condition).

The Commissioner argues that Mr. Riley's report is inconsistent with the opinions of Dr. Lysak and Dr. Price. (Dkt. No. 15 at 18.) The Commissioner's *post hoc* explanation, even if correct, is insufficient to cure the ALJ's error. *See, e.g., Ceguerra v. Sec'y of Health & Human Serv.*, 933 F.2d 735, 738 (9th Cir. 1991) ("A reviewing court can evaluate an agency's decision only on the grounds articulated by the agency."). If the ALJ wishes to discount the testimony of lay witnesses, the ALJ, not the Commissioner, must provide specific reasons that are germane to each witness. *Dodrill*, 12 F.3d at 919. On remand, the ALJ should reevaluate the weight given to plaintiff's brother's report.

Plaintiff's wife also completed a third-party report form on August 1, 2009. (AR at 195-99.) She reported that plaintiff could "flip in anger" over the littlest things, had prior drug-induced flashbacks, hallucinated, and was afraid to leave the house alone. (AR at 195.) She stated that plaintiff "[d]oes not sit still. He is always fidgeting with fingers constantly adjusting back or moving." (AR at 196.) She noted that simple driving directions confused him, and that he did not do well around other people. (AR at 197.) She stated that "[f]rom the time I met him until now there has been no positive change." (AR at 198.)

The ALJ rejected Mrs. Riley's third-party report as inconsistent with the evidence of record. (AR at 27.) For example, the ALJ noted there was no documentation in the medical record of drug-induced flashbacks. *Id*. The ALJ also noted that while Mrs. Riley reported plaintiff was unable to follow simple driving directions, plaintiff demonstrated the ability to perform simple instructions. (AR at 27, 197, 381, 559.) In addition, the ALJ pointed out the medical evidence shows that plaintiff's mental examination findings improved with medication and abstinence. (AR at 27, 492-93, 563-89.)

It may be improper for an ALJ to reject lay witness evidence as unsupported by medical evidence. *Bruce v. Astrue*, 557 F.3d 1113, 1115-16 (9th Cir. 2009). However, an ALJ may properly reject lay witness evidence that conflicts with other evidence in the record. *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2002) (identifying inconsistencies between such statements and the record when looked at as a whole is sufficient). The ALJ did not err.

D. Residual Functional Capacity

At step four, the ALJ must identify plaintiff's functional limitations or restrictions, and assess his work-related abilities on a function-by-function basis, including a required narrative

discussion. 20 C.F.R. §§ 404.1545, 416.945. RFC is the most a claimant can do considering his or her limitations or restrictions. SSR 96-8p. The ALJ must consider the limiting effects of all plaintiff's impairments, including those that are not severe, in determining RFC.

As discussed above, the ALJ erred in his assessment of the medical evidence requiring remand. Accordingly, on remand, after properly evaluating the medical evidence, the ALJ will reevaluate plaintiff's RFC. If the ALJ's RFC assessment is revised, the ALJ will conduct a new step four analysis and, if necessary, a step five analysis that incorporates any changes in plaintiff's RFC. At step five, the ALJ will also call a vocational expert ("VE") to testify about jobs that may exist with a properly framed hypothetical that incorporates all of plaintiff's limitations.

V. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's decision be REVERSED and REMANDED for further administrative proceedings not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

DATED this 7th day of February, 2012.

Mary Alice Theiler
United States Magistrate Judge